Cannariato v Cannariato
2014 NY Slip Op 33723(U)
March 26, 2014
Supreme Court, Queens County
Docket Number: 20367/2011
Judge: David Elliot
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE David Elliot
Justice

IA Part 14

BARBARA CANNARIATO,

Plaintiff,

-against-

VINCENT CANNARIATO, JR., ET AL.,

Defendants.

Index Number 20367 2011

Motion Date November 8, 2013

Motion Cal. No. 16

Motion Seq. No. 4

The following papers numbered 1 to 22 read on this motion by defendants Vincent Cannariato, Jr. (Cannariato Jr.), Vincent's Limousine Service of New York, Inc. (Vincent's Limousine), 43-14 Broadway Corporation (the garage property), and 42-06 Broadway Realty LLC (collectively defendants), for an order dismissing the complaint pursuant to CPLR 3211 (a) (5) and (7); and, in the alternative, for summary judgment pursuant to CPLR 3212.

	Papers Numbered
Notice of Motion - Affidavits - Exhibits	1 - 5
Answering Affidavits - Exhibits	6 - 19
Reply Affidavits	20 - 22

Upon the foregoing papers it is ordered that the motion to dismiss the complaint is granted.

Plaintiff in this, inter alia, fraud and conversion action seeks damages based upon an alleged fraudulent transfer of her interest in Vincent's Limousine and the garage property, by her son, defendants Cannariato Jr. and her former attorney, Gary W. Weeks. The complaint alleges, inter alia, fraud, constructive trust, unjust enrichment, and conversion as it pertains to Cannariato Jr. The action against Gary W. Weeks, has been discontinued with prejudice, pursuant to a Stipulation of Discontinuance filed on May 22, 2013. Defendants move to dismiss the claims on the ground that they are, inter alia, time-barred. Defendants also move, in the alternative, for summary judgment in their favor. Plaintiff opposes the motion.

This is a dispute over the ownership and value of a limousine business. Vincent's Limousine was originally established by plaintiff and her late husband (under a different name), in the late 1960s. In 1985, plaintiff and her son, defendant Cannariato Jr., jointly created Vincent's Limousine. They each owned 50% of the outstanding shares of the company. The record indicates that plaintiff and Cannariato Jr. built up Vincent's Limousine to a business that generated more than $ 2 million in revenue annually. While Cannariato Jr. alleges that he was solely responsible for the successful growth of the company, it is undisputed that plaintiff made substantial financial contributions and worked in the business office on a daily basis.

After Cannariato Sr's untimely death, plaintiff received a settlement of his malpractice claim and used it to purchase the garage property in Astoria, New York. The purchase price was $ 240,000: $ 24,000 was paid by Vincent's Limousine, and $ 216,000 was loaned to the company by plaintiff. The garage property was used exclusively for the storage of Vincent's Limousine vehicles and as the business office. At the time the garage property was purchased, plaintiff and Cannariato Jr. allegedly agreed that Vincent's Limousine would pay plaintiff back the $ 216,000, plus interest at the rate of 7.5%. The monthly payments would be $2 ,000 per month, commencing August 1991. Cannariato Jr. alleges that it was agreed that when plaintiff's loan was fully paid by Vincent's Limousine, the garage property would be "transferred accordingly."

On May 18, 2000, plaintiff transferred 10% of her shares in Vincent's Limousine to Cannariato Jr.; as such, at that point, plaintiff retained a 40% ownership interest in the company. Minutes of the meeting of the board of directors and shareholders of Vincent's Limousine indicate that the transfer was made "in recognition by Barbara Cannariato of the time and effort of Vincent Cannariato, Jr., in the operation, conduct and expansion of the business." It does not appear that plaintiff disputes this fact.

In December 2002, plaintiff allegedly contacted her then-attorney Gary Weeks about transferring title to the garage property used by Vincent's Limousine, to Cannariato Jr. It is alleged that Weeks advised plaintiff about protecting the company and prepared the deed and ancillary documents. On December 27, 2002, title to the garage property was transferred to Cannariato Jr. It was agreed that plaintiff would be paid the balance of the money owed to her from the original purchase, which at the time was $ 100,000, plus the sum of $ 240,000, representing one-half of the value of the property as of December 2002. Allegedly, at plaintiff's request, payments were to be made as weekly salary in order for plaintiff to qualify for additional social security benefits. The $ 340,000 purchase price is documented by a 20-year note and mortgage which was ultimately executed in 2004.

On January 21, 2004, plaintiff transferred her remaining interest in Vincent's Limousine to Cannariato Jr., and the $ 340,000 mortgage was filed against the garage property. Minutes of the meeting wherein the transfer took place, at paragraph 5, state the following: that "Recognition that Barbara Cannariato has no further ownership or interest in the corporation but shall continue as an employee and consultant of the company at her current salary until at least her 70th birthday."

For at least seven years following the transfer, plaintiff was paid according to the agreement, and signed tax returns reflecting her loss of ownership of both the garage property and in Vincent's Limousine. It is alleged that, between 2002 and 2013, plaintiff has been paid $ 479,135. Payments were made as salary, allegedly at plaintiff's request.

One August 30, 2011, plaintiff commenced the instant suit against, inter alia, Cannariato Jr., and her attorney, Weeks. The action against Gary W. Weeks has been discontinued with prejudice, as noted above. The complaint contains five causes of action: fraud, conversion, constructive trust, unjust enrichment and for an accounting regarding the transfer of plaintiff's ownership interest in Vincent's Limousine and the garage property. The branches of the motion which seek to dismiss the claims on the ground that they are time-barred under the applicable statutes of limitations are granted.

In the complaint, plaintiff asserts various claims in connection with the transfer of the garage property and the transfer of a 40% ownership interest in Vincent's Limousine from plaintiff to Cannariato, Jr. The complaint alleges that the deed was signed by plaintiff on or about December 27, 2002, and that on or about January 21, 2004, plaintiff executed certain documents that "were not discussed or explained" to plaintiff by either Cannariato Jr., or by plaintiff's attorney at the time, Gary W. Weeks. It appears that plaintiff's agreement to transfer the 40% of the outstanding shares of stock of the company was documented in the minutes of a meeting of the Board of Directors and Shareholders of the company, dated January 24, 2004.

A cause of action alleging fraud must be commenced within six years after the date on which the cause of action accrued or within two years after the time the plaintiff could, with reasonable diligence, have discovered the alleged fraud, whichever is later (*see* CPLR 213 [8]; *Banker v Vitanza*, 2014 NY Slip Op 01566 [2d Dept]; *Espie v Murphy*, 35 AD3d 346 [2006]). Causes of action alleging unjust enrichment and "to impose a constructive trust [are] governed by a six-year statute of limitations and begin to accrue 'upon the occurrence of the wrongful act giving rise to a duty of restitution and not from the time the facts constituting the fraud are discovered' " (*Reiner v Jaeger*, 50 AD3d 761 [2008], quoting *Soscia v Soscia*, 35 AD3d 841 [2006] [internal quotation marks omitted]; *see* CPLR 213 [1], [8]; *Ingrami v Rovner*, 45 AD3d 806 [2007]; *Congregation Yetev Lev D'Satmar v 26 Adar N.B. Corp.*, 192 AD2d 501 [1996]).

Here, plaintiff did not commence the instant action until more than six years after the date on which the fraud cause of action accrued and more than two years after she, with reasonable diligence, could have discovered the alleged fraud (*see Mizuno v Barak*, 113 AD3d 825 [2014]; *Prand Corp. v County of Suffolk*, 62 AD3d at 682; *Espie v Murphy*, 35 AD3d at 347). In support of their motion to dismiss the complaint pursuant to CPLR 3211 (a) (5), defendants established, prima facie, that the causes of action alleging fraud, constructive trust, and unjust enrichment are time-barred by showing that they accrued on December 27, 2002, the date when the transfer occurred, or on January 27, 2003, when the subject deed was recorded (*see Matter of Schwartz*, 44 AD3d 779 [2007]; *Swift v New York Med. Coll.*, 25 AD3d 686, 687 [2006]). Thus, any action alleging fraud, constructive trust or unjust enrichment with respect to the deed signed on December 27, 2002, should have been commenced on or before December 26, 2008, to be within the six year Statute of Limitations set forth in CPLR 213 (1) and (8). Any action alleging fraud, constructive trust or unjust enrichment with respect to the alleged "documents" executed on January 21, 2004, should have been commence no later than January 20, 2010, to be timely. Finally, any action alleging conversion should have been commenced no later than January 20, 2007, to be within the three year Statute of Limitations applicable to conversion, as provided in CPLR 214. Plaintiff did not commence the instant action until August 30, 2011. Having filed this action alleging fraud, constructive trust, conversion and unjust enrichment more than eight years after the execution and recording of the deed, and more than seven years after the transfer of stock, plaintiff's claims are, respectively, time-barred pursuant to the applicable Statutes of Limitations.

Moreover, plaintiff failed to commence this action within two years after the fraud could have been discovered with reasonable diligence (*see* CPLR 203 [g]; *Fredo v McNamara*, 254 AD2d 251 [1998]). Plaintiff alleges that she "discovered the existence of [documents which she executed] for the first time in 2011 when she was "prompted" to take a look at her holdings upon her son having met a woman with whom he was to have a child.

"The test as to when a plaintiff, with reasonable diligence, could have discovered an alleged fraud is an objective one" (*Prand Corp. v County of Suffolk*, 62 AD3d 681 [2009]; *see Prestandrea v Stein*, 262 AD2d 621 [1999]). A cause of action based upon fraud accrues, for statute of limitations purposes, at the time the plaintiff "possesses knowledge of facts from which the fraud could have been discovered with reasonable diligence" (*Oggioni v Oggioni*, 46 AD3d 646 [2007]). "The two-year period begins to run when the circumstances reasonably would suggest to the plaintiff that he or she may have been defrauded, so as to trigger a duty to inquire on his or her part" (*Shalik v Hewlett Assoc., L.P.*, 93 AD3d 777 [2012]). Furthermore, "[t]he burden of establishing that the fraud could not have been discovered before the two-year period prior to the commencement of the action rests on the plaintiff, who seeks the benefit of the exception" (*Lefkowitz v Appelbaum*, 258 AD2d 563 [1999]).

Ordinarily, an inquiry as to the time a plaintiff could with reasonable diligence have discovered the alleged fraud is a mixed question of law and fact (*see Trepuk v Frank*, 44 NY2d 723 [1978]). However, a complaint should be dismissed upon a motion where it conclusively appears that the plaintiff had knowledge of facts which should have caused her to inquire and discover the alleged fraud (*see Dumbadze v Lignante*, 244 NY 1 [1926]; *Azoy v Fowler*, 57 AD2d 541 [1977]). Here, plaintiff's claim of ignorance is overwhelmed by her acts and the evidence to the contrary, including the testimony of Weeks that he discussed the transactions at length with plaintiff and that she properly executed all transfer documents and reviewed each and every tax return from 2000 through 2010 (which indicate her stock and property ownership). The undisputed record indicates that plaintiff negotiated the payment of a salary in lieu of a balloon payment for stock and property transfers. Plaintiff made no objections to the transfers, made no inquiries as to what might have happened to her shares, never questioned the structure of the transactions and accepted payments being made to her for over ten years. "It is well settled that if a party " 'omits [an] inquiry *when it would have developed the truth*, and shuts his [or her] eyes to the facts which call for investigation, knowledge of the fraud will be imputed to him.' " (*Prestandrea v Stein*, 262 AD2d 621 [1999], quoting *Higgins v Crouse*, 147 NY 411 [1895] [emphasis added].) Having positive knowledge of fraud is not required to commence the running of the two-year statute of limitations (*Watts v Exxon Corp.*, 188 AD2d 74 [1993]). Rather, in order to start the limitations period regarding discovery, a plaintiff need only be aware of enough operative facts so that, with reasonable diligence, she could have discovered the fraud (*id.*). In other words, all that is necessary are sufficient facts to suggest to a person of ordinary intelligence the probability that he/she "may have been defrauded" (*id.*).

Moreover, plaintiff signed documents pertaining to the transfers at issue. Plaintiff alleges that she signed the documents without properly reading them and thought she was transferring the garage property to the business and not to her son, as an individual. "A party who signs a document without any valid excuse for having failed to read it is "conclusively bound" by its terms (*Gillman v Chase Manhattan Bank*, 73 NY2d 1 [1988]; *Sofio v Hughes*, 162 AD2d 518 [1990]; *see also Columbus Trust Co. v Campolo*, 110 AD2d 616, *affd* 66 NY2d 701 [1985]).

The causes of action in the complaint for constructive trust and unjust enrichment are equity actions and are both governed by the six year statute of limitations set forth in CPLR 213 (1). The six-year Statute of Limitations provided by CPLR 213 (1), which " 'commences to run upon the *occurrence* of the wrongful act giving rise to a duty of restitution and not from the time the facts constituting the fraud are discovered' " (*Mattera v Mattera*, 125 AD2d 555 [1986]). Here, the action was commenced more than six years after the alleged wrongful transfer of the property.

Finally, as to plaintiff's accounting claim, it too is governed by a six-year statute of limitations and is also time-barred (*see* CPLR 213 [7]). Also, plaintiff's allegations do not state a cognizable cause of action against Cannariato Jr., for an accounting. An accounting is an "equitable remedy . . . designed to require a person in possession of financial records to produce them, demonstrate how money was expended and return pilfered funds in his or her possession" (*Roslyn Union Free School Dist. v Barkan*, 16 NY3d 643 [2011]; *see generally Ederer v Gursky*, 9 NY3d 514 [2007]). Here, there are no allegations that Cannariato Jr. received any stolen monies or possessed any relevant documentary proof that plaintiff herself has not acquired.

Accordingly, the motion to dismiss is granted.

Dated: March 26, 2014

J.S.C.

FILED

APR 02 2014

COUNTY CLERK
QUEENS COUNTY